

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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COMCAST CABLE COMMUNICATIONS,	:	CIVIL ACTION NO. 12-0859
LLC, et al.,	:	
Plaintiffs	:	
	:	
v.	:	Philadelphia, Pennsylvania
	:	February 10, 2017
SPRINT COMMUNICATIONS	:	2:11 o'clock p.m.
COMPANY L.P., et al.,	:	
Defendants	:	
. . . . .	:	

AFTERNOON SESSION - DAY TEN  
BEFORE THE HONORABLE JAN E. DUBOIS  
SENIOR UNITED STATES DISTRICT COURT JUDGE

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1 (The following occurred in open court at 2:11  
2 o'clock p.m.)

3 THE COURT: Be seated, everyone.

4 MR. HANGLEY: Good afternoon, your Honor.

5 MR. FINKELSON: Thank you, your Honor.

6 THE COURT: All right. The first issue that we  
7 ought to address I think is the evidentiary issue raised by  
8 Mr. Riopelle regarding the use of the Marcus video and  
9 transcript and the Comcast demonstrative exhibits. Any  
10 agreement?

11 MR. FINKELSON: I don't know that we have an  
12 agreement, I can tell you what we discussed. You asked us to  
13 look at it some more on our side in the break, we did. I  
14 told Mr. Goettle where I thought the right breaking point  
15 might be.

16 It seems to me, your Honor, we have three different  
17 categories of things that we're talking about. Category A  
18 are slides that are prepared by expert witnesses and used as  
19 part of their presentations. And I believe the Court has  
20 already stated and I don't think either party is asking to  
21 revisit the issue that the slides will be going back with the  
22 jury, consistent with your Honor's wishes.

23 The second category of evidence is what I would call  
24 impeachment evidence and that is somebody's deposition  
25 transcript that they're handed up, right, to be impeached on

1 that they're reading into the record, or a set of discovery  
2 responses or the Marcus video and transcript. And Sprint's  
3 position on that is all of that just be treated equally with  
4 one another. In other words, if it's used for impeachment,  
5 it either goes back or it doesn't. But the odd thing about  
6 the Marcus video is that when the video starts playing the  
7 recording system stops recording. So unlike me reading a  
8 deposition response into the record, with respect to the  
9 video playing it's just a blank on the transcript, we don't  
10 have the actual text in the daily transcripts of the video.

11 But Sprint's position with respect to any  
12 impeachment evidence is at your Honor's discretion. We're  
13 happy to do it either way provided that all such impeachment  
14 evidence is treated the same for both parties.

15 And then the third category is what I would call  
16 lawyer argument or what is traditionally viewed as lawyer  
17 argument and in that bucket I would put anything that a  
18 lawyer is drawing on during the course of an examination or  
19 my picture that I introduced in opening, anything introduced  
20 in closing that's of similar ilk. I think from what we've  
21 seen in the case law that is traditionally treated as lawyer  
22 argument and doesn't go back with the jury.

23 And so with respect to that category Sprint's  
24 position would be that it all gets received into evidence, to  
25 use your Honor's words, which means it has a designation on

1 it for the benefits of the Court's tracking, but it doesn't  
2 go back to the jury; it's not evidence in exhibit form.

3 THE COURT: All right. What exhibits do you put in  
4 the context of lawyer argument?

5 MR. FINKELSON: So I would put my Defendants' -- I  
6 would put anything that has been marked as a drawing -- is  
7 there anything else that is of similar ilk? I don't think  
8 there's been -- I think everything with a demonstrative  
9 exhibit number is an actual demonstrative that an expert  
10 used, I believe. I think perhaps the opening, the Comcast  
11 opening demonstrative slides would be in the same bucket as  
12 my drawing. So the pictures of their people. I don't  
13 remember what your other demonstrative was in opening, but --

14 MR. GOETTLE: That was it, just pictures.

15 MR. FINKELSON: Yeah. So the pictures that were  
16 introduced of the Comcast witnesses, the drawing that I made,  
17 and everything that's been marked subsequently as a  
18 Defendants' drawing or as a Plaintiffs' drawing, again I  
19 think we should mark, as your Honor has requested, but that  
20 those wouldn't go back.

21 THE COURT: Would not?

22 MR. FINKELSON: Would not, because that really is I  
23 think traditionally viewed as lawyer argument.

24 THE COURT: And that would include exhibits used in  
25 opening. What about Mr. Goettle's notes on the exhibits?

1 MR. FINKELSON: It would include -- again, I'm just  
2 stating Sprint's position --

3 THE COURT: I understand that.

4 MR. FINKELSON: -- it would include those as well.  
5 I think those have all borne a Plaintiffs' Drawing  
6 designation. So anything marked as a Plaintiffs' Drawing or  
7 a Defendants' Drawing would be -- would not go back.

8 THE COURT: Okay. Impeachment evidence generally  
9 does not go back and you're talking about cross-examination  
10 using deposition transcripts, that would not go back. And I  
11 think that would trigger a point, we'll get to that, a jury  
12 instruction on impeachment. Has there any impeachment of a  
13 party? And in this case the party would be a 30(b)(6)  
14 witness, I think. I don't recall ever ruling on that.

15 Mr. Goettle?

16 MR. GOETTLE: On the -- I think the 30(b)(6)  
17 testimony of a Comcast witness was only by video, right? I  
18 think -- I can't remember if you actually played it or -- no,  
19 I think you --

20 MR. HANGLEY: No.

21 MR. GOETTLE: -- ended up not playing it.

22 MR. FINKELSON: Well, I mean, 30(b)(6)s would only  
23 be -- I mean, they'd only be -- I mean, I understand the  
24 30(b)(6) concept just in the concept of depositions, I think  
25 a party is a -- it's whatever that language is in the rules

1 that is the same type of party used in the 30(b)(6) context.  
2 So has there been anybody who's been a live witness who  
3 qualifies as that?

4 THE COURT: I don't --

5 MR. FINKELSON: Mr. Marcus may. I'd have to look at  
6 the definition. I mean, he's chief litigation counsel at  
7 Comcast, but I'd have to look at the definition to speak to  
8 that.

9 MR. HANGLEY: And Yarkosky, in impeachment him I  
10 used his testimony in which he was a 30(b)(6) witness.

11 THE COURT: Well, that's --

12 MR. HANGLEY: No, we don't care that that goes back.

13 MR. FINKELSON: Yeah.

14 THE COURT: Well, it wouldn't -- it's not -- no,  
15 we're not talking about going back now.

16 MR. GOETTLE: Okay.

17 THE COURT: It doesn't go back, does not. What  
18 we're talking about now is the jury charge and the jury  
19 charge will say that with a witness, not a party, a prior  
20 inconsistent statement is not independent evidence of what  
21 was said, it's only to be used by you in determining the  
22 believability of what the witness says on the witness stand.  
23 Witness. Party, different. When a party is charged with a  
24 prior inconsistent statement that can be considered an  
25 admission.

1 MR. FINKELSON: Yes, and I'd have to look. I'm  
2 familiar with your Honor's comments and I think the question  
3 I would just want to have the opportunity to look at with  
4 respect to Mr. Marcus is does he qualify as a party under  
5 that rule. And I'm not saying he does, I just would want to  
6 look at it before I represented to you that he doesn't, and  
7 were the statements he was making, were those within the  
8 scope of his party-dom, and that's something I also would  
9 want to do.

10 THE COURT: All right. I think what we'll do is  
11 include a point for charge on prior inconsistent statements  
12 of witnesses and parties. We'll try to get something out to  
13 you, I don't think it will go out today, but perhaps on  
14 Monday. We'll have to have another charging conference and I  
15 think we ought to have it after Mr. Riopelle returns, we have  
16 plenty of time, either Tuesday or Wednesday. You can plan  
17 your closings over the weekend, because I'm having a bit of  
18 difficulty with the damages part of this charge.

19 I just wanted to raise the issue and now let's get  
20 back to how we treat it, back to whether things go out to the  
21 jury. Impeachment evidence, we agree, does not go out. I'm  
22 having a difficult time drawing a distinction between, quote,  
23 "demonstrative exhibits" and exhibits used in lawyer  
24 arguments. And you've gotten all sorts of different ways of  
25 marking them.



1 MR. GOETTLE: Your Honor, in terms of the drawings  
2 that I have done on cross-examination, I'm okay with them not  
3 going back. What I had proposed to Mr. Finkelson during the  
4 break was that none of this stuff needs to go back, putting  
5 aside the expert slides they used in their presentations, I  
6 believe you already decided they would go back.

7 THE COURT: I think -- well, I think that helps  
8 explain --

9 MR. GOETTLE: I do too.

10 THE COURT: -- the testimony of all of the experts  
11 and it's rather -- I think it's very well done. Yeah, I  
12 don't think on liability --

13 MR. FINKELSON: I mean, I -- when you raised this  
14 issue the first time, your Honor, I told you our -- I think I  
15 told you our experience and view, which is that I had not  
16 seen those go back before. I understand your Honor's  
17 comments about how they may be helpful. Obviously each of  
18 the witnesses has prepared a slide presentation and is, you  
19 know, talking from it. I think the justification for it  
20 traditionally not going back is that it replaces the witness'  
21 memory of what the actual testimony was.

22 THE COURT: Replaces the witness' memory or --

23 MR. FINKELSON: In the jury's -- it replaces the  
24 juror's --

25 THE COURT: The jury's memory --

1 MR. FINKELSON: -- memory of what the actual --

2 THE COURT: -- of what the witness said.

3 MR. FINKELSON: Correct.

4 THE COURT: Another reason it would not go back, by  
5 analogy to the report of the expert who is testifying, the  
6 expert testifies, the report is not received in evidence.

7 MR. FINKELSON: Exactly. And so that had been our  
8 prior experience, but your Honor expressed a preference for  
9 doing it --

10 THE COURT: Well, I want to make the case as easy  
11 for the jury to understand as possible and I want to be  
12 equally fair to both sides. I don't want to adopt a position  
13 that automatically tilts in favor of one side or the other, I  
14 don't want to do that.

15 MR. FINKELSON: And I don't mean to suggest -- I  
16 don't -- I think both parties have hired graphics firms, both  
17 parties have had lawyers working hard and witnesses working  
18 hard in putting together those presentations. So I can't say  
19 that, you know, they tilt one way or another. However, the  
20 concern would be that they become a substitute for what the  
21 witness -- for what the jury actually heard from the  
22 witnesses and that would be an issue.

23 THE COURT: Well, I think the jury heard, I followed  
24 I don't think for the very beginning, I don't think I had it  
25 for Dr. Akl at the very -- as he testified, but I found that

1 it was very helpful for me to follow the testimony using the  
2 slides.

3 Well, you know, you've presented the issue, you have  
4 it now, is there agreement on the way we -- we're now talking  
5 about the slide decks, is there an agreement on the slide  
6 decks?

7 MR. GOETTLE: Comcast's view is they should go back  
8 for the reasons that you said.

9 MR. FINKELSON: Sprint's view is that they should  
10 not go back, but we understand that that's -- we understand  
11 your Honor's preference and obviously we'll abide by that  
12 should that be the direction the Court wishes to proceed.

13 THE COURT: I don't know that -- we haven't done any  
14 research on that, have we, Ian?

15 THE LAW CLERK: No.

16 THE COURT: We'll defer on that. I thought the tape  
17 decks were very well done.

18 MR. GOETTLE: Thank you.

19 MR. FINKELSON: Thank you.

20 THE COURT: But we'll see. I don't want to create  
21 an evidentiary issue that I don't have to create. I know I  
22 won't get reversed if they don't go back, I'm just concerned  
23 with what happens if they go back and --

24 (Laughter.)

25 MR. FINKELSON: Right.

1           THE COURT: -- the Federal Circuit says they should  
2 not have gone back. I can recall a call I got from a  
3 dissenter in a Federal Circuit opinion explaining the  
4 position taken by the majority -- never happened to me  
5 before, never got a call from a judge on an appellate court  
6 -- I shouldn't say that, it happened once before in a  
7 denaturalization case of someone charged with being involved  
8 in some pretty heinous crimes in Nazi German, but the Federal  
9 Circuit dissenter, I couldn't believe it. And then for  
10 reasons completely unknown to me, the case disappeared; it  
11 disappeared, it got resolved, but I don't want that to happen  
12 in this case.

13           So on demonstrative exhibits, they will go back.  
14 Then I need a charge which states that where we're talking  
15 about demonstrative exhibits it's the evidence that controls.  
16 They're really summary exhibits, I think, I don't remember  
17 all of them.

18           MR. FINKELSON: So is your Honor ruling that they  
19 will in fact go back?

20           THE COURT: Well, on dem -- no, I'm not talking now  
21 about the tape decks, now I'm talking about those whiteboards  
22 you referred to, not the lawyer -- the exhibits used in the  
23 opening. Give me an example of what you mean by  
24 demonstrative exhibit.

25           MR. FINKELSON: Sorry, because I -- and I want to

1 make sure our position is clear in case we were talking about  
2 two different things. So I have category 1, which are the  
3 slide decks --

4 THE COURT: Oh, I'm sorry.

5 MR. FINKELSON: -- that we used with the experts,  
6 which I thought we were -- which I thought is what you were  
7 just asking about.

8 THE COURT: Yes, I -- well, resolved slide decks  
9 from your perspective. You've told me your respective  
10 positions, I've deferred.

11 MR. FINKELSON: Oh, because you --

12 MR. HANGLEY: I thought you had agreed.

13 MR. FINKELSON: -- it sounded like you just said  
14 they were going back, so that's why I got confused.

15 THE COURT: No, no, no. What I said was -- I  
16 deferred --

17 MR. FINKELSON: Okay.

18 THE COURT: -- what I said was, if they go back and  
19 the Federal Circuit decides that they shouldn't go back, I'm  
20 in trouble; if they don't go back, no one can argue, I'm not  
21 in trouble. That's what I said.

22 MR. FINKELSON: That part I heard too. So I heard  
23 that, I just --

24 THE COURT: So I'm deferring on slide decks --

25 MR. FINKELSON: Okay. So number two --

1 THE COURT: -- but there are other -- there are  
2 other demonstrative exhibits, I thought, other than exhibits  
3 used in lawyer argument.

4 MR. FINKELSON: I don't -- well, lawyer argument  
5 and/or created by lawyers during the course of -- they're  
6 lawyer-created, so they're either created -- they're lawyer-  
7 created in court. So an example would be -- or were used for  
8 opening or closing arguments. So what I put in that second  
9 category that I can think of right now that exists are  
10 Plaintiffs' -- or Defendants' Drawing No. 1, which I drew in  
11 opening; Plaintiffs' Opening Demonstrative, which was just a  
12 picture of who the witnesses were going to be; and then each  
13 of Plaintiffs' Drawings 2 through whatever non-duplicative  
14 number Mr. Goettle may have marked them as which were created  
15 again in court.

16 So that's what I put in that second category. All  
17 of that is lawyers writing things down as part of their  
18 examinations, slash, presentations.

19 THE COURT: And does that cover all of the -- well,  
20 it covers all of the lawyer-created documents. Were there  
21 any other --

22 MR. HANGLEY: May I throw in a thought on that?

23 THE COURT: Pardon me?

24 MR. HANGLEY: May I throw in a thought on that?

25 Because I think that when a lawyer is examining a witness and

1 writing down the things that the witness is telling and the  
2 witness is validating what the lawyer is writing down, as  
3 they did when Mr. Goettle was writing down the list for the  
4 seven factors or when he was asking Mr. Lanning, putting  
5 circles around the things that were or were not supposedly  
6 core elements that were within the core element box, I think  
7 that's evidence. And I know personally that I have had  
8 things like that that I have done while a witness was  
9 testifying, and my handwriting is much worse than his, and  
10 they have come in in the past. I thought that was kind of  
11 SOP to let that in.

12 THE COURT: You and Goettle disagree on that.

13 MR. GOETTLE: Your Honor, I was -- at the lunch  
14 break what I had done with Mr. Finkelson is I offered a  
15 compromise just so that we wouldn't have protracted  
16 discussion about this. My compromise was, all right, none of  
17 it will go back, but if the jury asks for it, they should be  
18 made known that they can ask for whatever they want and if  
19 they ask for it, they should be provided it.

20 THE COURT: I think that's what I'm going to do,  
21 because although the handwritten notes by Mr. Goettle as the  
22 expert test -- I guess it was Lanning and Polish testified  
23 standing alone without the testimony -- I mean, they're  
24 circles, they really don't -- they're not self-explanatory --

25 MR. HANGLEY: No.

1 THE COURT: -- they raise a lot of issues. So I  
2 think what we'll do is not allow those to go out unless the  
3 jury asks for them and then we'll discuss the issue again.

4 MR. FINKELSON: So we'll just -- if I could just --

5 THE COURT: By agreement. And we're talking about  
6 all of the attorney-created --

7 MR. FINKELSON: I would just note for the record,  
8 your Honor, our objection -- and it sounds like it doesn't  
9 need to be raised now, it could be raised, but I would just  
10 note our objection to them going back even if requested, but  
11 I understand your Honor's --

12 THE COURT: It's a little early for that.

13 MR. FINKELSON: That's what I thought.

14 MR. HANGLEY: And I'm assuming that that presents no  
15 impediment if in closing we want to point to those --

16 THE COURT: Absolutely --

17 MR. HANGLEY: Thank you.

18 THE COURT: -- no impediment.

19 MR. HANGLEY: Okay.

20 THE COURT: So that takes care of lawyer-created  
21 documents. I've deferred on the tape decks and we agree  
22 that --

23 MR. FINKELSON: It was that -- now I remember what  
24 the word was that threw me, it was tape as opposed to slide.  
25 You said tape, I was thinking video of Mr. Marcus.



1 MR. HANGLEY: Beta max is what we call it.

2 MR. FINKELSON: That's what got me, the tape decks.  
3 I'm with you now.

4 THE COURT: You're stuck with -- I was described as  
5 a 19th century gentleman struggling with technology in the  
6 20th century and completely out of technology in the 21st  
7 century. That's the how come and why I got this case.

8 (Laughter.)

9 MR. FINKELSON: I don't remember Mr. Goettle saying  
10 it right just that way when he said it --

11 (Laughter.)

12 MR. FINKELSON: In jest --

13 MR. GOETTLE: He is being facetious --

14 MR. FINKELSON: -- let the record reflect --

15 MR. GOETTLE: -- yes.

16 MR. FINKELSON: -- a hundred percent.

17 THE COURT: I do remember now who made that  
18 statement and it's been repeated quite a few times.

19 MR. GOETTLE: Your Honor, there is one other -- I  
20 hate to say it, but there's one other drawing that hasn't fit  
21 into these categories and in fact I think it would fit into  
22 the tape deck, slash, slide deck category --

23 THE COURT: I'm sorry I called it a tape deck, it's  
24 slide decks.

25 MR. GOETTLE: The one is during Dr. Akl's direct

1 presentation he created a -- he wrote on the board, he talked  
2 about the patent and the problems and the solutions of the  
3 patent, to me that would -- that should get treated however  
4 -- however we end up treating the slides prepared by experts,  
5 we would ask that that get treated the same way. That was a  
6 board that he created on his direct examination.

7 THE COURT: That's right. That board you never  
8 showed to me. And by the way, a little lesson on boards.

9 MR. GOETTLE: Yeah.

10 THE COURT: If it's a Comcast board and Sprint is  
11 cross-examining not on the board, you don't want the jury  
12 looking at the Comcast board. I debated about saying  
13 something. You want to flip the board so that the jury is  
14 looking at the reverse side of the board, so that while  
15 you're cross-examining the witness, the witness isn't being  
16 reminded of what the witness said in response to the use of  
17 the board.

18 MR. FINKELSON: What's interesting is that I vividly  
19 remember Comcast making that -- not moving our board, but I  
20 hadn't remembered me not moving theirs and I don't think I  
21 moved theirs. So I think it was both of us did the same  
22 exact thing, but I don't remember --

23 THE COURT: I think both of you did the same thing.

24 MR. FINKELSON: I think so.

25 THE COURT: And --

1 MR. HANGLEY: I'm thinking about a case that I tried  
2 out in Montgomery County a couple of years ago where every  
3 time my opponent would walk across the room he would move my  
4 board, and then I would find an excuse to walk across the  
5 room and move it back to where it was.

6 MR. FINKELSON: So just so the record is clear, we  
7 would object to that going back to the jury.

8 THE COURT: I never saw --

9 MR. HANGLEY: On the same basis --

10 THE COURT: -- quote --

11 MR. HANGLEY: -- correct?

12 THE COURT: -- that. It was shown to the jury and I  
13 decided -- I heard the testimony and I knew what it dealt  
14 with, but I never saw the board, and we're not addressing  
15 that now. Right now Comcast takes the position that, I'll  
16 call it Dr. Akl's board --

17 MR. GOETTLE: Thank you, your Honor.

18 THE COURT: -- is dovetailing on the slide decks and  
19 I've deferred on that.

20 MR. FINKELSON: And we would just note our objection  
21 for the record.

22 THE COURT: All right. And the only other thing  
23 we've covered so far and then we'll get to the charge is the  
24 instruction on prior inconsistent statements and I'll include  
25 that. My goal this afternoon -- it won't take us that long

1 until we get to royalty, I don't know how long that will  
2 take, but my goal is to go through the charge, point out  
3 things that we ought to discuss, and get you a charge  
4 probably on Monday.

5 MR. FINKELSON: And just so you know, your Honor, we  
6 had mentioned a potential additional instruction prior to the  
7 bread, we're not going to present that today, we've withdrawn  
8 it. We reserve the right to revisit it as the evidence comes  
9 in.

10 THE COURT: You don't have to --

11 MR. FINKELSON: And similarly Comcast had presented  
12 us with a potential addition, which we objected to and they  
13 have agreed to not present today, reserving their same --

14 THE COURT: Fine.

15 MR. FINKELSON: -- rights with respect to that.

16 THE COURT: All right. I think what we ought do is  
17 turn to the charge. The last copy of the charge that was  
18 sent to you was dated January 23rd, that's the charge that we  
19 will be working with. And I think the easiest thing for me  
20 to do is to quickly review it. You ought to have it in front  
21 of you and if you don't, I have an extra -- we'll make extra  
22 copies. Do you have a copy?

23 MR. FINKELSON: I do. I had one quick question for  
24 you: I take it since we're going to have the -- and you've  
25 said this multiple times throughout, but since we're going to

1 have another final charging conference today is not the day  
2 to raise our final objections with respect to the charge for  
3 the record, so --

4 THE COURT: Final objections after I give the  
5 charge, at sidebar.

6 MR. FINKELSON: And reserved until then. I just  
7 wanted to -- I didn't want to belabor the proceedings --

8 THE COURT: But I want to hear all of your  
9 objections now in an effort to resolve them. So I see no --  
10 I had no comments with regard to -- I'm on page 10 -- page  
11 11, stipulation of facts, was the first page on which I think  
12 we have to make some changes and they're not issues that will  
13 create a problem.

14 First of all, Sprint has pared down its party list,  
15 so we have to take out the first and third sentences of  
16 numbered paragraph 2. And then paragraph 4 is not correct --  
17 well, maybe it is, but I'm going to change it to make it --  
18 have it read a little better, a little easier.

19 4, you state, "U.S. Patent Application," and then a  
20 number, "was filed December 21st, 2000." I propose saying  
21 "The application for the '870 Patent," dash, "U.S. Patent  
22 Application number," and that number, dash, "was filed on  
23 December 21st, 2000." I think the link between those first  
24 two paragraphs needs to be made.

25 And the second sentence of paragraph numbered 4,

1 "The application named Auti Ahou (ph) as inventory and  
2 claimed priority to Finnish application number," whatever,  
3 "filed on December 23rd, 1999." I think that's -- it just  
4 makes it a little easier to understand.

5 And paragraph 6, I didn't like the phrase "and has  
6 since owned the patent," I think it -- most jurors don't talk  
7 that way -- "and has owned the patent since then." Minor  
8 changes that we'll make.

9 Use of deposition testimony. There's nothing in  
10 that part of the charge about use of deposition testimony to  
11 cross-examine. Does anyone think that's necessary?

12 MR. FINKELSON: So, yes, I do, because if it's just  
13 for cross-examination then it --

14 THE COURT: Yes.

15 MR. FINKELSON: -- seems to me it falls into a  
16 different -- it falls into a different bucket. I don't think  
17 that's what we had in mind when we were doing it. I'm trying  
18 to think at the same time I'm talking as to how we might  
19 correct it. The only testimony -- there was no deposition  
20 testimony presented as evidence that was read into the  
21 record, all the deposition testimony that was presented as  
22 evidence was done by videotape and there was very little of  
23 it, less than I think I've ever seen in any case I've been  
24 involved in, but nonetheless it was very little of bit.

25 But I would think that there should be a

1 clarification there to the extent it was just used for  
2 impeachment.

3 THE COURT: I agree. Why don't you come back to me  
4 on it since you'll have a day off, submit a proposed revision  
5 of the use of deposition testimony by Monday midafternoon,  
6 we'll make it 3:00 p.m., revised to distinguish between  
7 deposition testimony offered as substantive evidence and  
8 deposition testimony used in cross-examination.

9 I'm looking at the next charge, demonstrative  
10 exhibits, toward the end, third line from the bottom. "These  
11 illustrations called demonstrative exhibits have not been  
12 admitted into evidence and should not be considered as  
13 evidence." That's certainly a correct statement of the law.

14 MR. HANGLEY: But the next statement is important.

15 THE COURT: But we have admitted them. And maybe  
16 they should just have been marked. Comments on that?

17 MR. FINKELSON: And that would be reflective of our  
18 position on that issue, your Honor, that they have been  
19 marked because your Honor wanted everything marked, but in  
20 terms of going back to the jury they would not. I think that  
21 goes back to the category one and perhaps and also the  
22 category two in my examples before.

23 MR. GOETTLE: Your Honor, maybe you could write  
24 "these illustrations called demonstrative exhibits have been  
25 received by the Court, but have not been admitted as evidence

1 and should not be considered as evidence."

2 MR. HANGLEY: But the next statement remains  
3 important.

4 THE COURT: Oh, absolutely, yes, that's key.

5 MR. GOETTLE: And then maybe in the next sentence  
6 get rid of the word "received" and say "admitted" there, so  
7 there's no -- so there's a distinction made between admitted  
8 and received.

9 THE COURT: "These illustrations called  
10 demonstrative exhibits have been received by the Court, but  
11 have not been admitted as evidence and should not be  
12 considered as evidence." I think that works. Do you  
13 disagree, Mr. --

14 MR. FINKELSON: No, I think from an instruction  
15 language, I think that is correct.

16 THE COURT: And then the last sentence is correct:  
17 "Rather, it is the underlying testimony of the witnesses and  
18 the exhibits received" -- no, "admitted in evidence," I see  
19 the point you were making.

20 MR. HANGLEY: And then that last "is" should be  
21 changed to an "are."

22 THE COURT: The last -- what did I do?

23 MR. HANGLEY: The last "is" should be an "are."

24 MR. FINKELSON: You know --

25 MR. HANGLEY: "The underlying testimony and the



1 exhibits are the evidence in the case." I do my best.

2 MR. FINKELSON: I can't argue with that.

3 (Laughter.)

4 THE COURT: "Are," okay. Use of notes, I decided to  
5 break it with -- in the middle with the sentence, "You should  
6 not share your notes." I don't want that buried in the  
7 middle of the paragraph.

8 Claims of the parties, I had no issues.

9 Summary of contentions.

10 MR. HANGLEY: Wait, I lost --

11 THE COURT: I'm on page 17.

12 MR. HANGLEY: Okay.

13 THE COURT: A minor change. I note that the Bar  
14 Association uses -- where is that?

15 (Pause.)

16 THE COURT: Federal Circuit Bar Association uses the  
17 phrase "you will then need to decide" a lot and that's  
18 colloquial. And I have a lot of comments about what they say  
19 on more significant issues, but I'm going to change that to  
20 read, "If you decide that any claim of the '870 Patent has  
21 been infringed and is not invalid," instead of you will need  
22 to, "you must decide the amount of any money damages to be  
23 awarded to Comcast to compensate it for infringement."

24 Just minor cosmetic --

25 MR. HANGLEY: Excellent, much improved.

1 MR. FINKELSON: I'm sorry, what was the -- so is it  
2 "you then must," or you're taking out "will then need," then  
3 also --

4 THE COURT: You must decide --

5 MR. HANGLEY: He's taking out "you will then need."

6 THE COURT: Minor, minor -- and you'll get a chance  
7 to look at it. Instead of "you will then need to decide," it  
8 will read, "you must decide the amount of any damages."

9 Page 18 in the second paragraph, minor change. "The  
10 law says," I decided to say "The law provides."

11 MR. FINKELSON: Can we use that against you when we  
12 get to future instructions when you say the patent lawyers  
13 are making it sound more complicated than it is?

14 THE COURT: No. How a claim defines what it covers,  
15 I think that's fine. Dependent and independent claims. I  
16 really didn't see -- I know Comcast -- that was an issue on  
17 which I wanted Comcast -- well, I wanted Comcast to withdraw  
18 the issue. There must be a dramatic reason why -- no, maybe  
19 it's because of damages, I hadn't thought it through, why you  
20 didn't withdraw.

21 MR. GOETTLE: It's the primary validity issue that  
22 -- you'll see it next week when you hear from Dr. Akl, but it  
23 relates to validity.

24 THE COURT: Because if Claim -- well, that means  
25 Claim -- but if Claim 1 is invalid, the other claims are

1     invalid.

2             MR. GOETTLE:  No, sir.  If Claim 1 is invalid, Claim  
3     7 can still be found -- Claim 7, which depends from Claim 1  
4     but it's narrower, can still be valid.

5             THE COURT:  Okay.  And that will become clear on I  
6     guess Tuesday?

7             MR. GOETTLE:  If I do my job right, yes.

8             THE COURT:  Well, I've given you a lot of time, I'm  
9     holding you to a higher standard.

10            MR. GOETTLE:  Okay.

11            THE COURT:  Claim interpretation, my language.  
12     Infringement generally, no problems.

13            Take a look at page 24 on infringement, second  
14     paragraph.  Does that work in view of what you just said, Mr.  
15     Goettle, on dependent claims?

16            MR. FINKELSON:  That works because it's the other  
17     way around on infringement.  So you can't -- if you don't  
18     infringe an independent claim, you can't infringe a dependent  
19     claim.  But on the flip side and for the same reasons, an  
20     independent claim can be invalid yet the dependent claim  
21     valid --

22            THE COURT:  Can be valid --

23            MR. FINKELSON:  -- because it's changed its --

24            THE COURT:  -- okay, because of something added by  
25     the dependent.

1 MR. FINKELSON: -- or it's changed its scope so it's  
2 narrow -- so it adds an additional limitation, for example.  
3 So a piece of prior art may -- to take the example here, one  
4 of the dependent claims says the same box must be doing two  
5 of the functions, so you may have a piece of prior art  
6 where --

7 MR. HANGLEY: Where that's happen --

8 MR. FINKELSON: -- where the jury finds that that  
9 didn't happen in the dependent claim and that would lead to a  
10 different result, which is not the case here, I note for the  
11 record, but Mr. Akl may -- Dr. Akl may disagree.

12 THE COURT: Now into invalidity and prior art, no  
13 problems.

14 Anticipation. I have an issue with respect to the  
15 third paragraph that reads now, "An invention is not new if  
16 it was already patented or described in a printed publication  
17 anywhere in the world before December 23rd, 1999." That  
18 obviously is an incorrect statement. It should read, I  
19 submit, "On this issue the '870 Patent is not new if it was  
20 already" -- and I'm not sure about "if it," we might have to  
21 substitute a word for "it" like, "if the invention was  
22 already patented or described in a printed publication  
23 anywhere in the world before the priority date of the patent,  
24 December 23rd, 1999."

25 Input from Comcast first.

1 MR. GOETTLE: I'm sorry, your Honor, could you read  
2 it again?

3 THE COURT: Right now it says, "An invention is not  
4 new if it was already patented anywhere in the world before  
5 December 23rd, 1999." It cuts too broad, it has to be  
6 limited to the '870 Patent --

7 MR. GOETTLE: Oh.

8 THE COURT: -- because not every patent --

9 MR. GOETTLE: Oh.

10 THE COURT: -- is invalid.

11 MR. GOETTLE: Maybe the invention of the '870 Patent  
12 is not new? Oh, sorry, you already have language.

13 THE COURT: Well, what I submitted and I'm not  
14 married to this language --

15 MR. HANGLEY: I just realized what this says.

16 (Laughter.)

17 THE COURT: I said, "On this issue" --

18 MR. FINKELSON: I'm going to use this instruction in  
19 every single case for --

20 (Laughter.)

21 THE COURT: What, what, what?

22 MR. FINKELSON: With any --

23 MR. HANGLEY: But only when you have a defendant --

24 MR. FINKELSON: -- for -- right, for exactly what  
25 the -- none of us caught that, it is in fact saying that no

1 invention is new --

2 (Laughter.)

3 MR. FINKELSON: -- as it relates to this -- as it  
4 relates to that date. Can I make a suggestion, your Honor?

5 THE COURT: Yes.

6 MR. FINKELSON: And I think Comcast, I'm expecting  
7 they'll agree, I think if you refer to the '870 Patent  
8 globally you've departed from the claims, which it really is  
9 the test. And so the prior paragraph refers to the claimed  
10 inventions, so I think if you said "the claimed inventions  
11 are not" --

12 THE COURT: Yes.

13 MR. FINKELSON: -- "new if they were already" --

14 THE COURT: Yes, yes, that's better.

15 (Pause.)

16 THE COURT: And maybe to make it clear, the claimed  
17 inventions of the '870 Patent Claims" -- a dash -- "Claims 1,  
18 7 and 113," dash, "are not new if" -- and I think "the  
19 claimed inventions were already patented or described in a  
20 printed publication anywhere in the world before the priority  
21 date of the '870 Patent, December 23rd, 1999." That's fine,  
22 that's better.

23 A little further down, last paragraph that page,  
24 there's a reference to "a prior art reference inherently  
25 present or disclosed." That hasn't surfaced in any argument.

1 MR. GOETTLE: Right.

2 THE COURT: It really is a concept I think the jury  
3 might have a little trouble with. What does it mean?

4 MR. GOETTLE: Your Honor, I actually don't -- I  
5 don't recall -- I don't think Dr. Polish raised inherency at  
6 all yesterday, I think -- it strikes me that we don't need to  
7 deal with inherency at all.

8 THE COURT: Mr. Finkelson?

9 MR. FINKELSON: Your Honor, that's one I'd like to  
10 have an opportunity to look back at his testimony and just be  
11 sure of how the evidence came in and then address it. I  
12 don't think I will have a reason to disagree with Mr.  
13 Goettle, I just want to take the opportunity to be sure.

14 THE COURT: I'm going to make a note, delete  
15 inherent on page 27, Finkelson to advise by 3:00 p.m.

16 MR. HANGLEY: Would that get rid of the whole  
17 paragraph?

18 MR. GOETTLE: Yeah, that whole paragraph is  
19 inherency.

20 THE COURT: I'm looking.

21 MR. FINKELSON: To that I can answer yes. In other  
22 words, I still need to get back to you on whether I think the  
23 evidence warrants including an inherency instruction, but I  
24 agree that if it doesn't that whole in determining paragraph  
25 would come out.

1 THE COURT: Okay. What is inherent anticipation?

2 MR. GOETTLE: Do you want to field that or do you  
3 want me to?

4 MR. FINKELSON: It was an issue that was addressed I  
5 believe, your Honor, in Comcast's summary judgment motion  
6 with respect to anticipation, at least with respect to a  
7 reference or two. The language is if it's not -- I'm going  
8 to butcher this, but if there's an express disclosure I think  
9 the case law language is it must be -- it must necessarily  
10 flow from or necessarily something from the reference. So in  
11 other words, I'm not going to try to characterize it lest it  
12 be used against me in future proceedings, but that's the  
13 concept. So there's not an express disclosure, but in order  
14 to practice what is set forth in the reference you  
15 necessarily have to do it in a particular way, I think is the  
16 way the cases --

17 THE COURT: All right. And you'll advise us before  
18 3:00 on Monday whether we can take out that last paragraph on  
19 page 27, which continues onto page 28.

20 THE COURT: All right and you'll advise us before  
21 3:00 on Monday, whether we can take out that last paragraph  
22 on page 27, which continues on to page 28.

23 MR. FINKELSON: That was not a statement of the law,  
24 that was Finkelson's on-the-fly account without prejudice.

25 THE COURT: Obviousness, I have no problem with 39,



1 but a problem on page 30. And I have the Federal Circuit Bar  
2 Association model instructions. And when I read this  
3 sentence, it's in the last paragraph. "To find it rendered  
4 the invention obvious, you must find that the prior art  
5 provided a reasonable expectation of success. Obvious to try  
6 is not sufficient in unpredictable technology." That's the  
7 sentence I had trouble with. It's in the Federal Circuit Bar  
8 Association instructions.

9 MR. FINKELSON: So, your Honor, just first, I just  
10 note and I think your Honor's already decided this, but to  
11 remind your Honor of our position and we'll reserve it at the  
12 final charge or after the charge for your Honor's  
13 instructions. But you'll recall on 29, in the obviousness  
14 instruction Sprint had originally proposed the able  
15 instruction that talked about the higher the level of skill  
16 in the art, the easier it may be to establish obviousness.  
17 So, that's something that we had raised previously.

18 With respect to your Honor's current question --

19 THE COURT: And let me go there. I know I ruled it  
20 out.

21 MR. FINKELSON: You did.

22 THE COURT: Let me see what my notes say.

23 (Pause.)

24 THE COURT: I know we took it out, I have a note,  
25 but I'm having a little trouble understanding.

1 MR. FINKELSON: And I think Comcast objection had  
2 been that it was redundant and we had argued, at the time,  
3 that it came straight from the Aiple instruction and we  
4 didn't believe was redundant with construction.

5 THE COURT: Well, I had trouble with this. I didn't  
6 not like the term easier to establish. And I thought the  
7 instruction without it. We'll try -- I'm not going to hold  
8 us up now. We'll try -- okay, well, we'll come back to  
9 that. But what about --

10 MR. GOETTLE: Your Honor, maybe for this first two  
11 sentences of the last paragraph on page 30?

12 THE COURT: Yes.

13 MR. GOETTLE: Maybe we could defer that until Dr.  
14 Akl actually testifies. I'm having a hard time, I actually  
15 find a little challenging, too and it could be that we can  
16 just delete both sentences. But that would be an easier call  
17 for me to make after I've really internalized what Dr. Akl  
18 was going to say on Tuesday.

19 THE COURT: What comments do you have on that issue,  
20 Mr. Finkelson?

21 MR. FINKELSON: I don't believe it is really the  
22 subject of Dr. Akl's -- I don't recall it being a position  
23 that he has taken or one that's really in play by the nature  
24 of the obviousness defense, so my assumption is, is it won't  
25 be an issue, but it really is -- the sentence, you know,

1 those sentences are ones that a plaintiff would want to have  
2 if it was a relevant issue. So, I think it really is.

3 THE COURT: Well, what does it mean, obvious to try?

4 MR. FINKELSON: There's a line of cases from the  
5 Federal Circuit with respect to obviousness and there was --  
6 it goes to the concept of if you're in an unpredictable  
7 technology, the mere fact that it is an obvious thing to  
8 attempt to do doesn't render it obvious.

9 THE COURT: Unless it's a successful attempt or  
10 something like that.

11 MR. FINKELSON: Or there's more of a reason that it  
12 would be obvious that it would reach the result as opposed to  
13 the trying.

14 THE COURT: Right, I have a note.

15 MR. HOFFMAN: That works, that works, close enough.

16 THE COURT: Finkelson on patent instructions.

17 MR. HOFFMAN: There you go.

18 MR. GOETTLE: Mark that transcript, too.

19 THE COURT: Goettle to get back by 3:00 p.m. on  
20 Monday. 3:00 p.m. on Monday, on this issue.

21 MR. GOETTLE: Okay.

22 THE COURT: Oh, well, wait a minute.

23 MR. GOETTLE: I was going to suggest just --

24 THE COURT: That might not work if you're not going  
25 to -- did you release Dr. Akl or is he sleeping over this

1 long week?

2 MR. GOETTLE: Oh, no, yeah, he's here. We have a  
3 lot of work to do this weekend, so I think 3:00 p.m. on  
4 Monday will be fine.

5 THE COURT: Okay. Level of ordinary skill, now  
6 enlighten me on the law. This definition of level of  
7 ordinary skill is not much. Is there a reason for that? The  
8 experts, for example, have given more concrete definitions of  
9 it.

10 MR. GOETTLE: Oh, yeah, this one. This instruction  
11 on 31 is how do you figure out what the level of ordinary  
12 skill is. What the experts have testified to, in particular  
13 Mr. Lanning and Dr. Polish, they've testified to what the  
14 actual level of skill is in their opinion, applicable to this  
15 patent.

16 THE COURT: But we don't have a definition of a  
17 person having ordinary skill in the art.

18 MR. GOETTLE: I don't know that there's -- I know  
19 that there's a difference between the two experts and what  
20 they're opining, but I think it's a difference without a  
21 distinction for the case. Is Sprint taking a position on it?

22 MR. FINKELSON: Well, I think, I mean, I think --  
23 so, our experts have certainly identified in their testimony,  
24 your Honor, what their position is with respect to the level  
25 of skill in the art is or more appropriately, what the person

1 having the level of ordinary skill in the art is. I believe  
2 Dr. Akl also did, if I recall, in his infringement testimony.  
3 I may be mistaken. I think all of the experts have or will  
4 take the position that their opinions apply under either  
5 definition, either party's definition. But I don't think  
6 that removes the issue from the case. In other words, the  
7 jury is entitled to make a determination as to what the level  
8 of skill in the art is as that bears on the issues. So, for  
9 example, the jury could reasonably conclude that Sprint's --  
10 Sprint's expert's definition of the level of skill, which  
11 requires a greater degree of either education or experience.  
12 I believe it's -- in a more specific experience, as I recall  
13 and I'm not going to get this right. Comcast can speak to it  
14 more appropriately.

15 But I think Dr. Akl's definition is more generally  
16 in the field of communications than I believe the Sprint's  
17 expert's definitions are. So, the jury could reasonably find  
18 that Sprint's level of skill is the more appropriate one and  
19 they have to apply the level the skill in deciding for  
20 obviousness, for example, whether a skilled artisan would  
21 have found the patent obvious. So --

22 THE COURT: But there's no definition. We have what  
23 is the level of ordinary skill. Do you think that is  
24 sufficient without more on determining what a person of  
25 ordinary skill in the art would know?

1 MR. FINKELSON: If I understand your correctly, I  
2 think what the jury will have is two competing definitions of  
3 level of skill and that this instruction is sufficient to  
4 allow them to make a distinction between them should they so  
5 choose.

6 THE COURT: Do you agree, Mr. Goettle?

7 MR. GOETTLE: Yeah, I don't remember how the levels  
8 of skills between the two parties compare. That part, I  
9 don't, I'm not disagreeing. I don't know. But these are the  
10 five factors you would look at in trying to determine what  
11 the level of skill is. So, from that perspective, I mean, I  
12 think the instruction is right.

13 THE COURT: Okay. The next instruction, scope and  
14 content of prior art appears fine. It's based on the Federal  
15 Circuit Bar Association.

16 Next, damages. The first sentence and I'm on page  
17 33, reads "If you find that Sprint infringed any valid claim"  
18 and when I read it the first time, I really didn't pick up  
19 the fact that valid referred to the challenged invalidity.  
20 And I wondered if I'm being too sensitive to that issue and  
21 what I propose, if you find that Sprint infringed any claim  
22 of the '870 Patent and that any such claim was valid. I  
23 think that's a little more clear, because Ian and I read it  
24 together. He picked up the fact that validity was covered by  
25 the one word. But I think it's easy to miss.

1 MR. GOETTLE: The issue I have with that is that  
2 it's, by saying valid, it's making -- it sounds like we have  
3 to prove it's valid.

4 THE COURT: Any such claim was not invalid and then  
5 you're getting into weird double negatives. In which case,  
6 this working would simpler and I've always -- I mean, I've  
7 always that the meaning it's got to be infringed and it's got  
8 to be valid. But I'm fine, if you would rather break it  
9 apart, but it should say not invalid.

10 THE COURT: I agree with you, on that score.

11 MR. FINKELSON: Your Honor --

12 MR. HANGLEY: Or there are a lot of negatives in  
13 that paragraph.

14 MR. FINKELSON: -- yes. I think the valid -- I  
15 would concur with Mr. Goettle that, as written, this is how  
16 I've generally seen it.

17 THE COURT: Well, that's how it's -- that's how it  
18 appears in the Federal Circuit Bar Association. So, we'll  
19 leave it as is.

20 MR. FINKELSON: Okay.

21 THE COURT: There's any valid claim if you find that  
22 Sprint infringed any valid claim of '870 Patent.

23 Reasonable royalty, relevant factors. There are 18,  
24 you've eliminated one and there are a few as 15. However  
25 many there are, we were going to come back to the relevant

1 factors to see whether any more could be eliminated.

2 MR. GOETTLE: Your Honor, all the testimony is not  
3 in yet on this and I'm wondering if it would make sense to  
4 this at the final charging conference?

5 THE COURT: Yes.

6 MR. FINKELSON: We agree, your Honor and just to  
7 note for the record, with respect to the reasonable royalty  
8 definition, Sprint would renew it's request to --

9 THE COURT: Well, wait, we're not there yet, are we?

10 MR. FINKELSON: I think we jumped past it. So, I  
11 think you --

12 THE COURT: I did?

13 MR. FINKELSON: -- went to relevant factors in  
14 reasonable royalty definition --

15 THE COURT: Okay, all right.

16 MR. GOETTLE: -- before you get to the factors.  
17 That's the one, your Honor, on the reasonable royalty  
18 definition where Sprint had asked for the specific  
19 instruction with respect to apportionment. It's in --

20 THE COURT: Let me see.

21 MR. FINKELSON: I believe Footnotes 43 and 44 of the  
22 last version from -- that the parties have submitted.

23 THE COURT: I'm going back to what we do with  
24 charges. We put together a binder that covers the joint  
25 submission and any other authority we have and that's what I



1 have -- that's this big binder and I'm just looking at it.  
2 You're talking about the statement, the reasonable royalty  
3 award must be based on the incremental value if the patent  
4 method adds to your royal process. And the accused methods  
5 had both patented, un-patented features. In measuring this  
6 value requires a determination of the value weighed by the  
7 patent. I say the first two sentences should go out, should  
8 not be used and then sentence three was withdrawn. I think  
9 you both agreed to withdraw sentence three.

10 MR. FINKELSON: I don't have a not on that, your  
11 Honor and since that's sentence three, I would just want to  
12 check and confirm whether that was correct, just because I  
13 don't have any kind of memory of it.

14 MR. HANGLEY: I have a note that sentence three was  
15 withdrawn, but I don't know --

16 MR. HOFFMAN: I think sentence three --

17 MR. HANGLEY: This is a joint submission.

18 MR. FINKELSON: It was not a joint submission, it  
19 was -- right, I understand what your Honor was saying. So,  
20 this was a Sprint proposal in the joint submission.

21 THE COURT: Well, as I know, I'm looking.

22 MR. HOFFMAN: I don't have the joint submission, but  
23 my recollection on this point, your Honor, is that we had a  
24 very long discussion about it being -- this submission being  
25 duplicative of Georgia-Pacific Factors Number 11 and 13. And

1 I believe, your Honor, that we decided -- eventually decided  
2 that it was duplicative, which is why we -- the sentence is  
3 not in there.

4 MR. FINKELSON: I understand why -- your Honor did,  
5 according to the notes I have, your Honor did not include the  
6 language for the reasons that Comcast argued and just  
7 re-articulated and I think, I just want to note for your  
8 Honor, Sprint's continuing position that it be included as  
9 part of the Aiple model patent jury instructions 11.13. And  
10 I was just saying I couldn't, I couldn't say that Sprint had  
11 withdrawn its desire for the ultimate combination sentence,  
12 just because I don't have a note of that in my notes in front  
13 of me.

14 THE COURT: Let me read what I have.

15 MR. HANGLEY: I can't tell what. I have it in front  
16 of me, your Honor, but I --

17 THE COURT: Sprint's proposed language comes  
18 directly from the Aiple model jury instructions, which also  
19 lists the Georgia Pacific factors. In recognition of the  
20 Federal Circuit's emphasis on the importance of a  
21 proportionate and patent features from the un-patented  
22 features in reaching a reasonable royalty. And the citation  
23 I have is Csiro, C-S-I-R-0, and Vernatex (ph). Comcast said  
24 the additional language is duplicative of and gives unfair  
25 weight to the Georgia Pacific -- which Georgia Pacific factor

1 do you think covers this?

2 MR. HOFFMAN: 11 and 13.

3 (Pause.)

4 THE COURT: And your argument, Mr. Finkelson?

5 MR. FINKELSON: Our argument, your Honor, is that it  
6 is not duplicative and I mean the Aiple model constructions  
7 include the Georgia Pacific factors and in addition, they  
8 include this Section 11.13. As we noted in the submission,  
9 apportionment is and has been a focus of the Federal Circuit  
10 in this line of cases and other ones and I believe that's why  
11 the Aiple instruction includes it in addition to the full  
12 listing. And frankly, I think it's an issue that is -- is  
13 squarely presented in this case, as well. As your Honor has  
14 heard our concerns and --

15 THE COURT: Well, I have a concern surface with Dr.  
16 Cox's testimony and it's teed up this language, it might be  
17 teed up by the 11 and 13 of the Georgia Pacific factors. The  
18 language Sprint proposes, the reasonable royalty award must  
19 be based on the incremental value of the patented method as  
20 to the overall process. Well, Comcast's position is that  
21 that's accomplished by taking the steps of the '870 Patent  
22 and determining which steps were infringed and which steps  
23 were not. And when I ruled on that issue in the Daubert  
24 ruling, I did not rule that method out and said any  
25 challenges are the stuff of which cross-examination is made.

1 But when I heard Dr. Cox today, something else  
2 occurred to me and that is that there are -- he said tens of  
3 thousands of patents in the Smart Phones. And so, the  
4 testimony of Dr. Akl and I expect you to tell me if I'm  
5 wrong, didn't rule out any of the contributions of the other  
6 patentees. And assumed, after allocating expenses, that all  
7 of the profits attributable to the infringed steps or based  
8 on the '870 Patent or were earned as a result of the '870  
9 Patent. But there are lots of other patents that weigh into  
10 the cellphone and I didn't quite understand. Well, let me  
11 back off. The testimony, the way Akl testimony is that the  
12 profits attributable to messaging or thus and such. And she  
13 accounted for costs and ended up with profits which she  
14 identified to messaging and then counted steps and said the  
15 steps which infringed were two out of seven, three out of  
16 seven and therefore, two sevens or three sevens -- whatever,  
17 she came up with a figure of 24 percent. That assumes that  
18 all the profits for messaging were derived from the '870  
19 Patent. It didn't take into consideration the contributions  
20 and the many other patents on the cellphone. Now, am I  
21 missing something?

22 MR. GOETTLE: Well, your Honor, Dr. Cox was even  
23 asked on cross today if he's a technical expert and he said  
24 no. So, what you heard was from a damages expert throwing  
25 out ten thousand patents. There's no technical expert

1 backing that supposition up and we didn't get to it today,  
2 but that will be a subject matter on cross.

3 THE COURT: Well, there are other patents involved  
4 in cellphones -- Smart Phones.

5 MR. GOETTLE: There probably are, your Honor, but  
6 I'm not sure why it's relevant.

7 THE COURT: Well, it's relevant if the step  
8 allocation doesn't take into account the contributions of all  
9 of the other patents to the profits generated by Sprint's  
10 messaging service.

11 MR. GOETTLE: Your Honor, there is no technical  
12 expert who is coming in and talking about what these other  
13 patents are, it's a theoretical and I think this is what  
14 we're going to be crossing Dr. Cox on.

15 THE COURT: And you're going to cover it in your  
16 rebuttal testimony?

17 MR. GOETTLE: Well, we'll see how it comes out, but  
18 if we need to we will.

19 THE COURT: But nevertheless, the step counting  
20 method, something no one argued, Sprint didn't argue it,  
21 attributes all of the profit from Sprint's messaging service  
22 to the '870 Patent.

23 MR. HOFFMAN: It does not, your Honor.

24 THE COURT: Well, the profit as adjusted, it's  
25 adjusted only by costs.

1           MR. HOFFMAN: But the whole point of the  
2           apportionment method is to figure out what relates to the  
3           '870 Patent and then there's an acknowledgement that most of  
4           it actually doesn't relate to the '870 Patent.

5           THE COURT: Say that again, please?

6           MR. HOFFMAN: Okay, sure, the process of step  
7           counting is to do apportionment and figure out what part of  
8           the profit might relate to the '870 Patent. And then  
9           reserves the rest of the profit, that doesn't relate to the  
10          '870 Patent, gives that back to Sprint.

11          THE COURT: No --

12          MR. HOFFMAN: So, it only looks at a portion of the  
13          profit based upon the steps that are --

14          THE COURT: But no, it doesn't address the question  
15          of what steps relate to the '870 Patent. Unless there are  
16          two ways of saying the same thing. You might be saying the  
17          same thing, as I'm saying. It says the apportionment, the  
18          infringement, the alleged infringement, the Sprint Messaging  
19          Servers, infringes these steps of the '870 Patent, but not  
20          the other steps. It does not state, it does not cover  
21          whether the infringing steps have profits that are generated  
22          by other patents.

23          MR. HOFFMAN: There's no other evidence in the  
24          record as to whether or not Sprint practices any other patent  
25          with respect to the messaging. There's no technical expert

1 who's opined that, in fact. And Mr. Lanning certainly didn't  
2 opine on this, that there is any other Sprint patents that  
3 apply. All we heard today from Dr. Cox, which again, we  
4 didn't see his expert report on this. Was that there are  
5 some ten thousand patents out there that cover generally  
6 cellphone technology. But that's, again, he's not a  
7 technical witness. Again, we're going to get a chance to  
8 cross him on that sort of assertion.

9 In terms of what's in this case, the only patent  
10 that Sprint and at this point, if we're talking about  
11 damages, that Sprint practices with respect to messaging is  
12 the '870 Patent.

13 THE COURT: Well, that's the only patent Comcast  
14 owns that's applicable.

15 MR. HOFFMAN: Well, in fact, I think you know, I  
16 think that there was some stuff -- some suggestion in one of  
17 the expert reports or actually, Dr. Cox, that there may be  
18 other Sprint patents. But there was no technical expert  
19 opinion from Mr. Lanning as to whether or not Sprint actually  
20 practices any other specific Sprint messaging patents that  
21 it's owned. So, for purposes of this case, we're looking at  
22 one '870 Patent . And what Ms. Riley attempts to do is to try  
23 to figure out what's the value of the '870 Patent as it  
24 applies to messaging. She doesn't capture all of the product  
25 with respect to messaging.

1 THE COURT: I thought she --

2 MR. HOFFMAN: She doesn't, she doesn't at all.

3 She's --

4 THE COURT: Well, how did she eliminate profit?

5 MR. HOFFMAN: Sure, so she starts with this idea of  
6 figuring out what, in general, messaging profit is, which was  
7 about 53.8 percent. She then takes out of that what was  
8 called normal profit with respect --

9 MR. HOFFMAN: I said that, she adjusts for costs.

10 MR. GOETTLE: Well, that's adjusting --

11 THE COURT: But not, but not for the contributions  
12 of other patents.

13 MR. HOFFMAN: She adjusts for the contributions of  
14 the '870 Patent, which is how she applies -- then multiplies  
15 it by 24 percent.

16 THE COURT: That's not my point. My only point is  
17 that based on what Cox said, it occurred to me that the  
18 steps that Ms. Riley found were infringed by Sprint and she  
19 took from that, that proration of the total profits  
20 attributable to messaging. She arrived at a figure. That  
21 step did not take into consideration the question whether the  
22 infringed steps of the '870 Patent generated profits based on  
23 the contributions, not only of the '870 Patent, but of other  
24 patents.

25 MR. HOFFMAN: I'm not following your last point,



1 your Honor.

2 THE COURT: Well, his point was that tens of  
3 thousands of patents in a cellphone and the Riley, it seems  
4 that the Riley formula didn't account for the contributions  
5 of any of those other patents to the profits of Sprint's  
6 messaging service.

7 MR. HOFFMAN: To the extent that there are any other  
8 royalties that Sprint has paid with respect to its messaging  
9 service and/or its entire cellphone CDMA service. That's  
10 taking into account by -- removing the 23 percent of profit  
11 from --

12 THE COURT: I meant -- right, right, say that again.

13 MR. HOFFMAN: It's a cost. So, when she went  
14 through and did this analysis, she started with what she  
15 called messaging profit and then she cut out of the  
16 messaging profit, 23 percent of it, she says she got a 53  
17 percent and she subtracted 23 percent. And that 23 percent  
18 represents any "profit", which of course is then based off of  
19 revenues and costs that Sprint puts its -- you know, Sprint's  
20 basically entire CDMA business, which would include any  
21 royalties that they may -- Sprint may or may not have paid  
22 with respect to any other patents that are out there.

23 MR. FINKELSON: Yes, but --

24 MR. HOFFMAN: But that's how she's taken that into  
25 account and she's --

1 THE COURT: But she hasn't taken into account the  
2 profit that was created by the contributions of any other  
3 patent to the steps that Comcast states Sprint infringed.

4 MR. FINKELSON: And I think --

5 MR. HOFFMAN: And there's no proof, your Honor, with  
6 respect to that there are any other patents.

7 THE COURT: You're right, except for Cox, he's not  
8 specific.

9 MR. HOFFMAN: Except for Cox, who is not a technical  
10 expert and no time in this case, has Sprint asserted that it  
11 has other patents that it is practicing relating to messaging  
12 and with respect to the number of steps. And even Mr.  
13 Lanning, when Mr. Lanning came up to dispute Dr. Akl's  
14 counting steps, he didn't say Sprint's got another patent  
15 that needs to be accounted with respect to the number of  
16 steps. His only argument was that Dr. Akl didn't count  
17 enough steps. That he used the wrong document, that there's  
18 another document that has twice as many steps as the document  
19 that Dr. Akl used. But Sprint has never raised and there's  
20 no evidence in this case other than Dr. Cox's mere  
21 speculation that there are other steps that should somehow  
22 account towards the messaging profit.

23 THE COURT: Well, you said other steps. I'm talking  
24 about other patents.

25 MR. HOFFMAN: Or other patents that would account

1 with respect to the other steps.

2 THE COURT: That's the issue and you're right, until  
3 Dr. Cox testified, I hadn't heard anything.

4 MR. HOFFMAN: And we hadn't heard it either from Dr.  
5 Cox before that, so we were sort of surprised when he said  
6 that.

7 THE COURT: All right.

8 MR. HOFFMAN: We'll address it -- we'll certainly  
9 have to address it in cross-examination.

10 MR. HANGLEY: It's a brand new issue in the case.

11 MR. HOFFMAN: Right.

12 MR. HANGLEY: That was not in any expert reports.

13 MR. FINKELSON: May I address your Honor's question  
14 in a slightly different way, because I think when your Honor  
15 says, are there other patents, it is -- and I know this isn't  
16 the way your Honor is asking, but when your Honor says are  
17 there other patents. It is directly tied to the issues that  
18 have been raised with respect to are there other steps and it  
19 is directly tied to this language that's in the second  
20 sentence of the jury instruction we're talking about, that  
21 your Honor said prompted your questions on this. When it  
22 says when the accused methods have both patented and  
23 un-patented features, you need to do an apportionment. That  
24 means, when you have what we have here is the sending of an  
25 SMS and MMS message, you have to account for portions of that

1 flow from message to message, that are allegedly attributable  
2 to the '870, but you also have to account for all the rest.  
3 And one of the cardinal flaws in Ms. Riley's step counting  
4 analysis nd why we don't think it should be accepted and we  
5 don't think it is reliable, is Ms. Riley comes up with a  
6 denominator that essentially eliminates all of the  
7 un-patented features. Ms. Riley, as opposed to looking from  
8 the whole flow, cellphone to cellphone sending an SMS  
9 message, which would be the relevant set of steps, given the  
10 allegations here in this case, she comes up with a smaller  
11 set of steps that more narrowly focuses, although not  
12 entirely under her own opinion, but more narrowly focuses, at  
13 least, on the smaller circle of the potential alleged  
14 invention. And then she says --

15 THE COURT: Well, that's --

16 MR. FINKELSON: -- with that smaller circle --

17 THE COURT: -- that's been in the case from the  
18 beginning and it was certainly covered in my Daubert opinions  
19 and I said it can be addressed on cross. The issue I raise  
20 is not steps that weren't counted. The issue I raise is  
21 whether other patents contributed to the profit. And the  
22 whole inquiry was based on -- my inquiry was based on what  
23 Dr. Cox said. I don't think it will serve any useful purpose  
24 to continue this. I'll look again at this statement about  
25 the reasonable royalty award.

1 MR. FINKELSON: Thank you, your Honor.

2 THE COURT: It's page 35. Okay, I think what  
3 happened, we were on the Georgia Pacific factors when I was  
4 backed into the reasonable royalty definition by Mr.  
5 Finkelson. And that's fine, that's the purpose of this, I'm  
6 going to call it a rolling -- a rolling charging conference,  
7 we're going to have more than one. We'll come back to the  
8 relevant Georgia Pacific factors. And we'll come back to  
9 adding Sprint's language.

10 Next, the form of reasonable royalty. This is page  
11 39 of the charge.

12 MR. FINKELSON: And I think this was the -- one of  
13 the main events, I suppose, your Honor, in terms of that.

14 THE COURT: Yes, I would characterize it that way.  
15 Although, when I addressed it that way at lunch, my  
16 colleagues thought I was nuts. Main event for the afternoon,  
17 form of reasonable royalty and patent infringement case.  
18 They were all dying to participate in this conference.

19 MR. FINKELSON: I'm sure.

20 THE COURT: Oh, boy. Oh, boy.

21 MR. HANGLEY: You party animal.

22 MR. FINKELSON: So, I think your Honor has the  
23 instruction that had been Sprint's proposal and --

24 THE COURT: Well, you didn't agree.

25 MR. FINKELSON: -- I'll start with everything, your

1 Honor has said all along this is all going to be reserved for  
2 further discussion.

3 THE COURT: Yes, yes.

4 MR. FINKELSON: So, I think we had a Sprint proposal  
5 that we took out of the Personal Audio case, which we think,  
6 thought and still think goes directly to the issue. Comcast  
7 had objected to that and proposed an alternative instruction  
8 to which Sprint objects.

9 THE COURT: Is that -- and that alternative  
10 instruction, I think, is the one appearing on the bottom of  
11 page 39, am I correct?

12 MR. FINKELSON: Correct, it's the one that is  
13 focused on time as opposed to and I think confuses the issues  
14 with respect to --

15 THE COURT: Well, what I want to know is, since  
16 we've had patent infringement cases from the get-go, how come  
17 the law is so fuzzy on this key issue? Because of one thing  
18 I'm certain, in a patent infringement case, the Court has to  
19 charge on damages. How can the law be so screwed up?

20 MR. HANGLEY: I blame the judges.

21 THE COURT: I don't.

22 MR. GOETTLE: Your Honor, as far as I've been  
23 understanding what the issues are, it sounded to me like the  
24 issue is whether the jury is awarding damages up to September  
25 30th or damages through the life of the patent. If that's

1 the issue, then the issue gets resolved by constructing on  
2 the time and then putting on the verdict form, you know, what  
3 sum of money do award and then say, is this award up through  
4 September 30, 2016 or through the life of the patent? That,  
5 to me, resolves the issue. If that's the challenge, that's  
6 the issue. The jury doesn't have to say whether its a lump  
7 sum or a reasonable or a running royalty and we would say,  
8 let's just take off the table. The issue is whether damages  
9 are being awarded through 2016 or through the life of the  
10 patent. The jury can tell us which one they gave.

11 MR. FINKELSON: And we obviously see the issue very  
12 differently, your Honor, when it comes to that. I think we  
13 have had -- we have had, throughout the case and still have  
14 the evidence as shown two competing theories of what type,  
15 what type, what form of royalty the parties would have agreed  
16 to in the hypothetical negotiation.

17 THE COURT: Although, your absent colleague said  
18 there's a case that said the jury must determine what type of  
19 royalty they're awarding. We found no such case.

20 MR. FINKELSON: And I will say the same thing to  
21 your Honor as I said to Comcast on the side, before you came  
22 in, the must language was not one that I recall Mr. Riopelle  
23 using. If he did, then I'll have to refer to him as to what  
24 case he has in mind. I don't have that case in front of me.  
25 I think -- what I understand from the law I have in front of

1 me, is that Lucent case says that there is, in fact, a  
2 difference between two types of royalties. One is running  
3 royalty, one is a lump sum and the Federal Circuit defines  
4 the difference between them. They're not just different in  
5 name, they're different in substance and in timing from one  
6 another.

7 And then in Lucent, the District Court did, in fact,  
8 include in its verdict form, a choice between those two  
9 things. And that's clear from the face of the Lucent opinion  
10 itself. The District Court, in that case, did that. It had  
11 the jury choose between a lump versus a running, as did the  
12 court in the Personal Audio case that is the basis for the  
13 instruction we provided. So, that's my -- that's what I know  
14 about and I don't know of any more direct -- I am not aware,  
15 as I stand here before your Honor -- of any statement from  
16 the Federal Circuits that says you must charge the jury on  
17 this.

18 What I know is you have a general principle that  
19 when the parties have -- there's a competing factual issues  
20 which is, in fact, for the jury to decide. That it is  
21 appropriate to have the verdict form reflect that factual  
22 dispute and have the jury make a determination on it, so we  
23 know what basis of damages the jury verdict, should there be  
24 one on damages, is grounded in. So, that's my understanding  
25 of the law. I think that's why the District Court in the



1 Lucent, in the case underlying the Fed Circuit opinion in  
2 Lucent, included that in the jury verdict form. I think it's  
3 why the Personal Audio case has done it.

4 And given the way the evidence has presented itself  
5 in this case, it's appropriate here. There's no question the  
6 parties have a disagreement as to what Nokia and Sprint would  
7 have agreed to in terms of form at the hypothetical  
8 negotiation. And Sprint's position is that they would have  
9 agreed to a lump sum for the life, which is what lump sum  
10 means per Lucent. And Comcast's position is that they would  
11 have agreed to a running royalty, which is reflected in Ms.  
12 Riley's slides, at PD-4, about 59 in front of me, but it's  
13 essentially, you multiply the number of messages times the  
14 royalty, times the royalty per message. Slide PD-4 of about  
15 62 is another. That's what a running royalty is. For each  
16 message, there is a particular royalty amount and you apply  
17 it. And that's the factual issue that, I think, the parties  
18 have been fighting about on the damages front and it's a  
19 factual issue that the jury is going to be asked to decide  
20 upon and the parties ought to know how the jury decided.

21 THE COURT: Well, I'm looking at the Federal Circuit  
22 Bar Association, anyone have a copy of those model  
23 instructions?

24 MR. FINKELSON: I think we have them electronically.

25 THE COURT: I'm looking at damages and it seems to

1 me that the first of those instructions that might be  
2 applicable, is -- I'll get the cites -- page 70 on my  
3 version. It's B --

4 MR. FINKELSON: B-6, Number 6.5, your Honor.

5 THE COURT: That's where I am.

6 MR. FINKELSON: I think that just goes to the  
7 entitlement to a reasonable royalty.

8 THE COURT: Yes.

9 MR. FINKELSON: In other words and I don't think  
10 there's a dispute between the parties. I mean, that's what  
11 patent statute says. It says that there's an entitlement to  
12 no less than a reasonable royalty in the event of  
13 infringement. And I think that what the instructions don't  
14 deal with is a situation or that instruction doesn't deal  
15 with is the situation like the one presented here where the  
16 parties actually do have a dispute as to the form of royalty.  
17 And that doesn't happen. Maybe part of the reason, your  
18 Honor, it isn't more prevalent is it doesn't happen in every  
19 case. I mean it's sometimes the case where the parties agree  
20 on the form.

21

22 THE COURT: Well, there are a lots of damages models.  
23 This case doesn't fit into any of the damages models the are  
24 identified in the table of contents under B6 damages. No  
25 lost profits and a number of the damages charges deal with

1 lost profits.

2 MR. FINKELSON: There's definitely no lost profits.

3 THE COURT: No collateral sales, no price erosion. I  
4 think maybe B6, as I read B5, 5 - that charge is  
5 inapplicable. It talks about proof of a claim for lost  
6 profits, and that's just not at issue here.

7 MR. FINKELSON: Correct.

8 THE COURT: The next instruction talks about  
9 reasonable royalty and gives a definition.

10 MR. FINKELSON: But we do know, your Honor, if I may  
11 -

12 THE COURT: But you haven't used that. I don't think  
13 6.6 is covered, although I might be -

14 MR. FINKELSON: I think we have a definition of the  
15 reasonable royalty.

16 THE COURT: Let me just ...

17 MR. HOFFMAN: On page 35, your Honor, I believe.

18 THE COURT: Let me go back.

19 MR. HOFFMAN: The language from 6.6 is used -

20 THE COURT: It's in 35?

21 MR. FINKELSON: Yes, it's in 6.2.

22 THE COURT: Yes.

23 MR. FINKELSON: But I think your Honor is correct  
24 that the form of the royalty issue is not in these - this set  
25 of -

1           THE COURT: And that's what I'm looking for now.  
2     It's not in - we're going to charge on 6.6 and we're going to  
3     charge on Georgia Pacific factors, which is 6.7. I've taken  
4     6.7, modified it by providing an introduction between the  
5     three factors set forth at the beginning of that instruction  
6     and the Georgia Pacific factors.

7           And next pattern instruction on damages is entitled  
8     date of commencement of damages. And that's not applicable.  
9     Well, it is. We'll charge it differently, but not the way  
10    they propose. And that's pretty much it.

11          MR. FINKELSON: Right. But we do know from Lucent,  
12    for example. So we know from - we don't have -

13          THE COURT: Well, why is that? I mean why are the  
14    model instructions silent on this key issue that must arise  
15    in every patent?

16          MR. FINKELSON: In many cases it doesn't, your Honor.  
17    In many cases the damages for precisely the reason that Dr.  
18    Cox opined upon today, and I know my colleagues on the other  
19    side are going to differ. But in many cases the parties do  
20    not have a dispute over whether the royalty would have taken  
21    the form of a lump sum or a running royalty. They most  
22    certainly will dispute the amount of the damages but in many  
23    patent cases they don't actually dispute the form. In fact I  
24    would - it may in fact be in more than many, it may be in  
25    most. But what we do know though is that the Federal Circuit

1 in Lucent, and we don't have the underlying verdict form, but  
2 we know from the Federal Circuit's opinion in Lucent that in  
3 that case the verdict form itself, because there was a  
4 disputed issue as between whether it should be a lump or a  
5 running, the verdict form listed that choice between a lump  
6 or a running. And we know that from - because the verdict  
7 form is discussed in the body of the Lucent -

8 THE COURT: I'll have to read. I think I skimmed  
9 Lucent awhile ago. I don't think I read Personal Audio, I'll  
10 have to read them both. But what I'm thinking of doing is  
11 not instructing the jury separately on running versus lump  
12 sum royalties. Because the running royalty, I think Heist is  
13 off to a good start in narrowing the terms. And that told me  
14 that he was only not going to finish by noon, he was not  
15 going to finish by 1:00 or 2:00, but still a good start.

16 MR. GOETTLE: It's a lot to unpack, your Honor.

17 THE COURT: He used the term summation. A running  
18 royalty is converted to a single sum.

19 MR. FINKELSON: But it's still a running royalty.  
20 And the Federal Circuit has said a running - I think what the  
21 Federal Circuit does in Lucent, I would submit to your Honor,  
22 is two things, neither of which is say to this Court you must  
23 instruct the jury on this issue. So neither of them is that.  
24 But it does two things. It tells us A, those terms have  
25 meaning. The Federal Circuit says a running royalty means

1 blank and a lump sum means something different.

2 THE COURT: Well -

3 MR. FINKELSON: And I can point to your Honor just so  
4 you have the benefit of the page numbers that I'm referring  
5 to. So it does two things. Starting on page 1326 of the  
6 opinion it describes the difference between a running royalty  
7 license and a lump sum license. Those are the terms that the  
8 Federal Circuit has used in discussing these issues, and I  
9 would submit to your Honor that they're in Lucent for a  
10 reason, notwithstanding any progress Mr. Heist may be off to  
11 in his cross-examination.

12 THE COURT: Well, what about - I think I have Lucent.

13 MR. FINKELSON: But it noted the jury very form.

14 THE COURT: But what about using, because they're  
15 both lump sums - yes. Comcast wants me to instruct the jury  
16 on whether their damages award if they find infringement and  
17 knowing validity, it covers damages through September 30<sup>th</sup>,  
18 2016, or damages for the life of the past. Doesn't that  
19 cover all of the issues that are involved both in running  
20 royalties and lump sum royalties?

21 MR. FINKELSON: I don't think it does, because I  
22 think it takes what is a substantive difference between the  
23 type of royalties and replaces it with a timing question.  
24 And that's -

25 THE COURT: What is the substantive difference?

1 MR. FINKELSON: The substantive difference, and  
2 Lucent talks about it, there are two types of licenses at  
3 least for the purposes of this discussion. One is a license,  
4 when you sit down at a hypothetical negotiation, I'm going to  
5 give you a one-time payment for the life of the patent. That  
6 is a lump sum.

7 A running royalty that is turned into a summation is  
8 not a lump sum. A lump sum is a one-time payment for the  
9 life of the patent.

10 THE COURT: Why can't we call it what makes sense in  
11 this case and what will make sense to the jury?

12 MR. FINKELSON: I believe Dr. Cox just testified that  
13 it's a lump sum. That's been his testimony, lump sum for the  
14 life of the patent. Ms. Riley has testified that it is a  
15 number of messages times a royalty rate. That is a running  
16 royalty. That's what Lucent says is a running royalty. And  
17 so those are two substantive differences-

18 THE COURT: Why do I have to get into that?

19 MR. FINKELSON: Because I think if you just focus on  
20 timing, your Honor, the jury is left confused with what  
21 they're being asked to do. The jury is then just saying,  
22 well, are we just being asked to assign damages through a  
23 date certain or not? And I don't think that's the question.  
24 They are being asked to decide between two substantive  
25 theories of damages, two forms of royalty. Not being asked to

1 decide, do I just decide up to X date? Comcast will just say  
2 we've only given you evidence up to X date. Of course that's  
3 all you need to decide upon. But this is the point  
4 altogether. That is not the dispute. The dispute is over  
5 the form of royalty. And that's why it's Sprint's position,  
6 and I think that's why it's explained this way in Lucent,  
7 it's Sprint's position that the jury should be instructed on  
8 form and should be given a verdict form that allows it to  
9 tell us and you whether it is chosen what is known under  
10 patent law is a lump sum or whether -

11 THE COURT: I'm looking at the Northern District of  
12 California, patent jury instructions. I think they rank  
13 close to Eastern District of Texas and District of Delaware  
14 in volume of patent cases. And they don't even call it a  
15 running royalty. They call it an ongoing royalty. And they  
16 talk about what you described as a running royalty which is a  
17 fixed number of dollars per unit.

18 MR. FINKELSON: And I believe the Lucent case came  
19 out of the Southern District of California. I don't have  
20 their instructions nor do I remember off the top of my head  
21 whether they have model jury instructions, but I'm happy to  
22 look into that, your Honor.

23 THE COURT: I don't Southern District does. That's  
24 San Diego, isn't it? I don't think they do. Certainly San  
25 Francisco does.



1 MR. FINKELSON: And I'm not sure, I'd want to look at  
2 the instruction. I'm not sure there's a substantive  
3 difference between ongoing and running, how they're using it.  
4 But I think the important point is there are two types of  
5 royalty and two forms of royalty, and that's what the parties  
6 are disputing. If the jury's just asked to decide on a date,  
7 I don't think that accurately captures how the evidence is  
8 coming in. I don't think it accurately captures what the  
9 nature of the dispute is and we know from at least the  
10 District Court in Lucent in the Southern District of  
11 California, it was put in the verdict form for that reason.  
12 We know that it was put in the verdict form in the Eastern  
13 District of Texas audio case that we've also presented to the  
14 Court. That's the why because it is a disputed issue. And  
15 it's a factual issue for the jury to decide.

16 THE COURT: But I'm trying to figure out whether it's  
17 a distinction without a difference.

18 MR. FINKELSON: I don't believe it is. I don't  
19 believe it is because, and I think - I don't believe it is  
20 for exactly the reasons candidly that your Honor just  
21 referred to. Because it sounds like a distinction without a  
22 difference. When you say they've applied a running royalty  
23 but just once you do the math, right, you multiply the number  
24 by the rate and you get a number that suddenly it looks like  
25 a lump sum, that's not a distinction without a difference.

1 Those were two entirely different methodologies for how to  
2 calculate a royalty. They're two entirely different type of  
3 agreements. And I think I'm sure they'll cross Dr. Cox on  
4 this because point today was when you sit down and you decide  
5 am I just going to pay you one one-time payment for the life,  
6 there's a lot of decisions and choices and risks and benefits  
7 that may come to both parties from doing that as  
8 distinguished from a running where there's no guaranteed  
9 payment at all. The payment just flows from whether it is  
10 actually made use of and how often. Those are two very  
11 different types of licenses. And the experts in this case  
12 have disputed that from the outset. And Spring submits that  
13 it's appropriate to get a jury determination on that, and  
14 have it be as clear as possible for us and for you what they  
15 have awarded.

16 I think Comcast has alluded to the fact that should  
17 they prevail in this case and get a damages award they may  
18 come back to the Court for further relief including -

19 THE COURT: Oh no, no (laughing). As much -

20 MR. FINKELSON: You might miss us.

21 THE COURT: As much as I like you guys, you don't  
22 have a running royalty on this courtroom. Oh my gosh.

23 MR. FINKELSON: But in any event, your Honor, it will  
24 give the parties clarity as to whether that, whether it be in  
25 your courtroom or one of your colleague's courtrooms whether

1 that's even an issue. If the jury finds damages for Comcast  
2 but finds that it is a lump sum royalty for the life of the  
3 patent, then it will be a one-time payment. If the jury  
4 finds for Comcast and finds that it's a running royalty, then  
5 there will be future business for the Eastern District of  
6 Pennsylvania to assist the parties -

7 THE COURT: I was just kidding. If there's future  
8 business for the Eastern District of Pennsylvania and I'm  
9 still around, it will come to me.

10 MR. FINKELSON: But not form over substance, your  
11 Honor. It really is a substantive difference.

12 THE COURT: Well, I want to avoid any issues with  
13 respect to future infringement.

14 MR. GOETTLE: Your Honor, you get there with the  
15 date.

16 If the jury checks the box that this is for the life of the  
17 patent, nothing going forward. If the jury checks the box  
18 that this is through September 2016, then we know for sure  
19 what happened. I still don't understand why it matters - why  
20 the parties need clarity on lump sum versus running royalty,  
21 and you have asked the question a lot of times and I think  
22 it's confusing. And I still don't understand why it matters  
23 whether the jury has picked a lumps sum or the sum that they  
24 give as running royalty. He issue I thought was keyed up as  
25 we don't know, but the date will be. And that's easily

1 clarified. But why it matters whether it's a lump sum or a  
2 running royalty to me. I just don't understand why that  
3 matters.

4 MR. FINKELSON: And it matters, your Honor, because  
5 the date is not a proxy for the methodology. The date is not  
6 a proxy for the methodology. Ms. Riley has applied a  
7 methodology. It is called the running royalty. The date's  
8 not a proxy for it. This jury is not going to understand the  
9 date to be a proxy for it. They're just going to be given a  
10 date. That confuses the issue that they're being asked to  
11 decide. They're not being asked to decide whether damages go  
12 up to X date or no. They're being asked to decide whether the  
13 parties would have agreed on a running royalty or a lump sum  
14 royalty.

15 And what I'm hearing Comcast saying is as long as  
16 you give them the option of the date, then they're  
17 essentially being asked whether they're adopting her running  
18 royalty methodology. But as I said, it's an imperfect proxy.  
19 As I said, I don't think it's a proxy at all for getting a  
20 jury verdict on the methodology. It will confuse this jury  
21 as to what it's being asked to do.

22 This jury can be instructed, we would submit, your  
23 Honor. There are two competing theories of what the royalty  
24 would be in the event of damages. Sprint's damages expert  
25 says lump sum for life of patent. Comcast's damages expert

1 says running royalty up through the date which he has  
2 information available, and we are going to ask you to decide  
3 that issue as part of your determination on damages. That's  
4 what happened - go ahead, your Honor.

5 THE COURT: The negative side of your argument is  
6 that it limits the jury to damage money, and that's what your  
7 proposed jargon says. Are there more than two damages miles?

8 MR. FINKELSON: Well, I think the proposed charge  
9 presents the jury with an instruction with respect to the two  
10 damages models that are being presented in the case. So if I  
11 come back to your Honor at 3:00 o'clock on Monday and tell  
12 you inherency can come out, that doesn't mean there's not  
13 other types of anticipation such as inherency. It means  
14 we're focusing the jury on the actual positions that have  
15 been taken in the case.

16 The same is true here. The actual positions being  
17 taken in the case are lump sum for the life, running royalty.  
18 Those are the two positions.

19 And the proposed verdict form in its current form,  
20 understanding that it is still under consideration by the  
21 Court gives the jury the opportunity to award an amount but  
22 also to tell the Court whether it has agreed with Comcast  
23 that the amount is a reflection of a number of messages times  
24 royalty rate, or whether it agrees with Sprint's experts'  
25 position that it is a one-time payment lump sum for the

1 payment of that.

2 THE COURT: Telecordia, which I'm looking at, I have  
3 a memo. I've just looked at the patent involved in  
4 Telecordia. It might be as complicated as the patent  
5 involved in this case. It's on page 1370. But let me get a  
6 cite.

7 But what Telecordia says, it's unclear whether the  
8 jury based its award on a lump sum, paid up license, I think  
9 that's one, and that's what Heist was on when we recessed.  
10 Running royalty, some variation or combination of the two or  
11 some other theory.

12 And apparently it's a 2010 case, and goes on to talk  
13 about discretion to interpret an ambiguous verdict form. I'm  
14 trying to avoid an ambiguous verdict form. I don't think  
15 Telecordia is very helpful, because it doesn't put its  
16 imprimatur on which types of royalties are appropriate. It  
17 just drops the issue.

18 MR. FINKELSON: I'm pulling it up, your Honor. I'm  
19 looking at it as you are as well. I think Lucent does put  
20 its stamp of approval though on a method in which the verdict  
21 form allows the jury to choose between a lump sum and a  
22 running royalty.

23 THE COURT: Oh. Calicordia (ph) was written by Judge  
24 Rader. He's no longer on the Federal Circuit, so ...  
25 (laughter.) I know Judge Rader. I know Judge Michele as

1 well. He's no longer on the Federal Circuit, probably  
2 enjoying life.

3 MR. FINKELSON: We included Telecordia in the brief,  
4 your Honor, because it points out the problems of not dealing  
5 with this issue in the verdict form. So if you don't have a  
6 verdict form that puts this issue to the jury to decide, you  
7 end up -

8 THE COURT: With a problem.

9 MR. FINKELSON: With a Telecordia problem. And we  
10 know from Lucent at least that the Federal Circuit doesn't  
11 have a problem with including it on the verdict form at a  
12 minimum.

13 (Pause.)

14 MR. FINKELSON: So Lucent, your Honor, at page 1325  
15 tells what happened at the District Court which was that  
16 Lucent had asked for a running royalty but Microsoft thought  
17 that it should be a lump sum payment. So it's the paragraph  
18 saying before the District Court.

19 THE COURT: Yes.

20 MR. FINKELSON: So we know that there was a dispute  
21 in that case as there is here whether it should be a lump sum  
22 or whether it should be a running royalty. And the verdict  
23 form gave the jury the choice between those two. There was a  
24 lump sum damages line apparently and the running royalty  
25 line. And we know the Federal Circuit does not disapprove in

1 any way in Lucent in that methodology.

2 And then it goes on to explain in substantive terms  
3 what the differences are between a running royalty license  
4 and a lump sum license using that terminology, running  
5 royalty and lump sum -

6 THE COURT: Well what went wrong in Lucent? I'm  
7 reading the sentence. "The verdict form notes a lump sum  
8 damages amount and no amount, i.e. zero or n/a on lines for a  
9 running royalty.

10 MR. GOETTLE: Yeah, I think the issue in Lucent was,  
11 and this is why having verdict forms that have more detail in  
12 them might create problems. As I recall, in Lucent the jury  
13 had checked the box for a lump sum, okay, but the amount that  
14 they gave reflected that it must have been a running royalty,  
15 and it created an ambiguity in the verdict, that was the  
16 issue.

17 MR. FINKELSON: Yeah ...

18 MR. GOETTLE: That doesn't sound right to you?

19 MR. FINKELSON: I think I'd characterize it slightly  
20 differently, but go ahead. I didn't mean to interrupt you.

21 MR. GOETTLE: No, that's okay.

22 No, if you think I'm wrong, you should -

23 MR. FINKELSON: No, go ahead, go ahead.

24 MR. GOETTLE: I teach a class at Drexel and I haven't  
25 gotten to damages this year, but this is my recollection from



1 years past. So they created an ambiguity because the lump  
2 sum amount would have been way lower. And because they  
3 checked the box for the lump sum but gave a higher award.  
4 Deductive reasoning indicated it was not a lump sum.

5 THE COURT: And then they say in analyzing the  
6 Georgia Pacific factors, factor two rates paid by the  
7 licensee for the use of other patents comparable. This is  
8 1326. Subsumed within this factor is the question whether  
9 the licensor and the licensee would have agreed to a lump sum  
10 payment or instead to a running royalty based on ongoing  
11 sales or usage.

12 MR. FINKELSON: Yeah, I think the ultimate conclusion  
13 was that the lump sum award wasn't supported by the  
14 evidenced. I'm not sure that that was as a result of any  
15 ambiguity. In fact I don't think it was as a result of any  
16 ambiguity created by the presence of both choices on the  
17 verdict.

18 THE COURT: What lesson do you want me to take from  
19 Lucent?

20 MR. FINKELSON: Two lessons. One, there is a  
21 difference in the law that is not form over substance between  
22 a running royalty and a lump sum for the life of the patent.  
23 That's lesson one.

24 Lesson number two is that Lucent does not critique,  
25 criticize or say anything negative about the District Court's

1 handling of the issue from a verdict form perspective in  
2 terms of including on the verdict form a line item for the  
3 jury to decide whether the appropriate form of a license is a  
4 running royalty or a lump sum. Those were the two lessons,  
5 and I think other courts have taken that lesson -

6 THE COURT: Well it doesn't - Lucent doesn't say that  
7 including the verdict form separate lines for a lump sum  
8 royalty or a running royalty is appropriate. It doesn't say  
9 it's inappropriate, but it doesn't say it's appropriate.

10 MR. FINKELSON: I think that's fair.

11 THE COURT: How can we be this far along in patent  
12 litigation and not have this issue clarified?

13 MR. GOETTLE: Your Honor, the issue does not matter.  
14 The question here is what are the damages that are owed to  
15 Comcast. Sprint is putting into evidence that the damages  
16 should be based on a lump sum, or putting into evidence that  
17 the damages should be based on a running royalty. It's up to  
18 the jury to figure out what those damages are.

19 Then the jury needs to decide because this is an  
20 issue that the parties have a dispute on whether that stops  
21 in September 2016 or whether that goes through the life of  
22 the patents. That's an issue the jury should decide.  
23 Whether it's on lump sum or running royalty is not an issue  
24 that matters. And I think that's why it's not required to be  
25 on the verdict form -

1 THE COURT: Well, it's written about quite  
2 frequently.

3 MR. GOETTLE: Well, and in Lucent it came up because  
4 it was on the verdict form. Because when they checked the  
5 box lump sum, there was a substantial evidence of a lump sum  
6 of whatever -it was a gargantuan amount in Lucent and there  
7 wasn't evidence of a lump sum of that gargantuan amount. It  
8 came up because there was an issue.

9 It's confusing. You have asked a number of times,  
10 what is that term again, running royalty. And I forget if  
11 you had another word.

12 THE COURT: Rolling.

13 MR. GOETTLE: And it is confusing. And I think  
14 having it on the form is creating confusion, not somehow  
15 eliminating it.

16 THE COURT: Well, not if we instruct on it. And the  
17 proposed instruction from Sprint is that we instruct on it.

18 MR. GOETTLE: That is - the proposed instruction from  
19 Comcast is to not instruct on it -

20 THE COURT: Yes.

21 MR. GOETTLE: - because it's confusing, and these  
22 instructions are 30-some pages long. So this is a pretty  
23 dense subject matter. So I don't think an instruction is  
24 going to unconfuse it. And I still don't understand why it  
25 matters. The date matters, the amount matters.

1 THE COURT: Well, the way it's calculated matters, so  
2 saith Mr. Finkelson.

3 MR. FINKELSON: Otherwise it just becomes a dispute  
4 over when we gave them message counts through. Right? Ms.  
5 Riley stood on the stand and nobody's going to factually  
6 challenge that she only has message data available to her  
7 through X date, because that was the most recent data we  
8 could supplement with. Why should that be the hook on which  
9 the jury makes its determination? That's not relevant.  
10 What's relevant is Ms. Riley's methodology applying a running  
11 royalty by multiplying -

12 THE COURT: I thought there was an agreement that  
13 because Sprint had only produced figures through September  
14 30<sup>th</sup>, 2016, that that had to be made clear to the jury.

15 MR. FINKELSON: I don't disagree that it needs to be  
16 made clear to the jury, and Ms. Riley has made it clear. It  
17 is not the basis on which we're asking the jury to render the  
18 verdict between these two competing damages positions. And  
19 by making it the date that the jury is presented with, it  
20 makes it the basis on which the jury is making the decision,  
21 when it has nothing to do with the date, it has to do with  
22 the methodology.

23 THE COURT: All right, let me read out loud, and you  
24 can be seated, the Sprint proposal. This is form of  
25 reasonable royalty. You must make two determinations

1 regarding a reasonable royalty. One, the amount of the  
2 royalty and two, the form of the royalty. After you  
3 determine the amount of the royalty you must determine the  
4 form of the royalty.

5 Isn't that contradictory to the concept of a running  
6 royalty which is based on sales and profits per sale which  
7 are attributable to the acts of infringement? You say  
8 calculate the amount first. Uh-oh.

9 MR. FINKELSON: You told me I could sit down, your  
10 Honor. Those were your exact words.

11 THE COURT: No, you can - we don't have to stand.

12 MR. FINKELSON: No, no, I'm happy to stand.

13 THE COURT: And I'm mindful of Mr. Riopolle's  
14 comments that you're much more than a technical person.

15 MR. FINKELSON: Well, we'll see. I'm just trying to  
16 go back to the personal audio charge which I believe we took  
17 this verbatim from, and I just want to make sure we didn't  
18 change the order as it appeared there.

19 THE COURT: I'll have to read personal audio in but I  
20 -  
21 I don't think I have that.

22 MR. FINKELSON: I have an extra copy, your Honor, if  
23 you'd like one. I have one with me.

24 THE COURT: We can pull a copy very quickly.  
25

1 MR. FINKELSON: And I can give you the cite if you  
2 need it.

3 THE COURT: It's the first time I've read your  
4 proposal out loud, and I have trouble with the first sentence  
5 of the -

6 MR. FINKELSON: Yeah, the form of the amount is  
7 reversed actually from what it is in personal audio, and I  
8 don't think that was done intentionally. In fact, I'm fairly  
9 confident it wasn't. So it would seem to make sense to  
10 address the form and then amount.

11 In personal audio the Apple, which is Eastern  
12 District of Texas 2011 Westlaw 106 209, the instruction was  
13 you must make two determinations regarding a reasonable  
14 royalty, the form of the royalty and the amount of the  
15 royalty.

16 THE COURT: Oh, it's reversed.

17 MR. FINKELSON: Yeah, it was reversed, the form of  
18 the royalty and the amount of the royalty.

19 May I approach, your Honor, with a copy?

20 THE COURT: Yes.

21 MR. FINKELSON: Don't tell Milahn. Don't tell her,  
22 don't tell her, don't tell her.

23 THE COURT: What did she do, spill water?

24 MR. FINKELSON: I did. Don't tell her.

25

1 THE COURT: Do we have any paper towels, Michael?

2 (Pause.)

3 THE COURT: All right. Well, we have to look at the  
4 personal audio case.

5 MR. FINKELSON: Thank you, your Honor. I do think  
6 that order makes more sense for the reasons you point out.

7 MR. GOETTLE: You Honor, I just want to point out, if  
8 we do go down this road, the language in the third sentence,  
9 this type of language is confusing. "A running royalty is an  
10 ongoing payment made by" - the jury is going to be awarding a  
11 number, and that's what we're asking the jury to do.

12 THE COURT: No, that's not - I agree with you, it's  
13 not that.

14 MR. FINKELSON: Okay.

15 THE COURT: It's a payment based on -

16 MR. FINKELSON: A sum, you know, (indiscernible) the  
17 firm or based on, yeah, that would be -

18 THE COURT: The licensee sales or usage of the  
19 patented technology.

20 Now, is there any way if we divide it, running  
21 royalty versus lump sum, and we might think of other words,  
22 other terms to describe it, whether the answer would provide  
23 a formula for calculating it, continued in (inaudible).

24 MR. GOETTLE: I'm wondering if we could do some  
25 research on that. I know you've asked that question before

1 about what happens going on past September 30<sup>th</sup>.

2 THE COURT: Oh, there are lots of cases that talk  
3 about - big, thick cases that talk about what happens after  
4 the jury returns a verdict. You see, my goal is -

5 MR. GOETTLE: To never see us again?

6 MR. FINKELSON: To read those cases.

7 MR. GOETTLE: Yeah, not to have to read those cases  
8 or see us again.

9 THE COURT: Not -

10 MR. GOETTLE: Well, maybe we could condense some down  
11 and go memo.

12 THE COURT: Well, maybe you both ought to rethink  
13 this and we will, too.

14 MR. GOETTLE: We will do that.

15 MR. FINKELSON: We will as well, your Honor.

16 THE COURT: I think there's a way to combine your  
17 issues and make more sense than this proposal.

18 MR. FINKELSON: We're happy to take another look at  
19 it and take another back. I do think the introduction of the  
20 date would be confusing and -

21 THE COURT: Do you want to try to reach agreement?

22 MR. GOETTLE: I mean we're happy to trade further  
23 proposals with one another. We have not been successful  
24 because we do - our approach is focused on the different  
25 types of license which is how the proof is coming in. Theirs



1 is focused on a date. And as long as we have that  
2 difference, I don't think we will reach agreement.

3 THE COURT: Oh, I think we can combine the two. But  
4 I'm not sure how significant September 30<sup>th</sup> date, is it?

5 MR. FINKELSON: I would submit it doesn't go to the  
6 parties' dispute. In other words, Ms. Riley and Dr. Cox have  
7 always disagreed on the nature of the royalty. There hasn't  
8 even been a date that is September 30<sup>th</sup> in this case until a  
9 month ago when that was the most recent data we could give  
10 them. And they don't want a verdict in this case that  
11 deprives them of whatever the period of damages is between  
12 the last time they had data and the date the jury renders a  
13 verdict. But that's not a disputed issue between the  
14 parties. That's not the nature of the dispute. That's just  
15 a function of the data.

16 So if they had today all of our data, then their  
17 position would be there'd be no reason to put any date in  
18 front of the jury at all because we don't ask juries for  
19 advisory verdicts about going forward. So if they had  
20 perfect data up until Wednesday and they were willing to give  
21 up six hours of SMS and MMS, there'd be no data issue  
22 whatsoever because they'd have a jury verdict that was up to  
23 date with whatever the usage was that they're producing to  
24 this jury. And all the rest would be for future in the event  
25 Sprint is found to infringe. So it's purely an artifact of

1 that. But in that circumstance we would still have the  
2 factual dispute between the parties over the nature of the  
3 royalty, and that would still be an issue for the jury to  
4 present. And that goes back to my point about why the date  
5 is not the dispute nor is it a fair proxy for the dispute.

6 THE COURT: Maybe not the total answer, but what's  
7 the - I understand the basis for your position. The damages  
8 are cut off as of September 30<sup>th</sup>. It's based on discovery.

9 MR. GOETTLE: Well, your Honor, we heard Dr. Cox  
10 today and his opinion is based through the life of the  
11 patent. So it's not September 30<sup>th</sup> per se, it's that Dr. Cox  
12 was putting forth a proposal that would be for the entire  
13 length of the patent. We're only - as between the beginning  
14 date of damages in this case we're only halfway through. We  
15 still have another six years until the patent expires.

16 MR. FINKELSON: What if we - I'm shooting from the  
17 hip. What if we had an instruction that was focused on the  
18 dispute, lump sum versus running royalty. So lump sum for  
19 the life of the patent versus running royalty, and we  
20 eliminated your September 30<sup>th</sup> issue - September 30<sup>th</sup> of 2016  
21 through wherever we are, February whatever of 2017, we  
22 eliminated that issue by having some sort of stipulation that  
23 that period was in no way compromised by what the - I'm just  
24 talking out loud. I don't think that's going to work.  
25

1           MR. GOETTLE: We'll throw spitballs at another way to  
2 do it.

3           MR. HANGLEY: I can't wait to see where this comes  
4 out, the sentencing and stuff.

5           MR. FINKELSON: I mean, yeah, that's why I stopped.  
6 But again, I'm trying to come up with a way because I really  
7 do think it's like, if you put that date in front of the  
8 jury, the jury can be confused as to whether they're deciding  
9 whether Comcast has been given data through that date or  
10 through time immemorial. And that's not the dispute between  
11 the parties. The dispute is not whether Comcast has been  
12 given data through that date. It's a dispute between two  
13 discrete types of licenses. They think it's one type, we  
14 think it's another type. And that's my issue with the date.

15           THE COURT: Well you bring this back down to  
16 licenses which is what is required of the hypothetical  
17 negotiation, it becomes even harder to articulate. An  
18 ongoing royalty - well, maybe not. Why don't you meet and  
19 confer and try to work through this. I'm telling you that  
20 the proposal is not going to work. And we'll work on it.  
21 We're not going to wait for you, we'll work on it as well.

22           What's a reasonable time for getting back on this  
23 issue? We've talked about 3:00 o'clock on Monday.

24           MR. GOETTLE: Do you think we could have until  
25 Tuesday, your Honor? Or is that too late?

1 THE COURT: No, that's fine. We'll have Tuesday  
2 night. I think we ought to schedule part two of the charging  
3 conference for Tuesday evening. So we're setting records.

4 MR. GOETTLE: So Tuesday at 3:00 o'clock?

5 THE COURT: No.

6 MR. FINKELSON: At the charging conference.

7 MR. GOETTLE: In terms of submitting -

8 THE COURT: No, I want it before the charging  
9 conference. Charging conference Tuesday evening. You said  
10 Tuesday. I didn't think you meant -

11 MR. GOETTLE: No.

12 THE COURT: - day end, too.

13 MR. FINKELSON: We're happy to do it whenever on  
14 Tuesday.

15 MR. GOETTLE: How about noon on Tuesday?

16 THE COURT: Fine.

17 All right, I think I'm out of issues.

18 MR. FINKELSON: My paper's all sopping wet so, your  
19 Honor, I can't tell you if I have anything else.

20 THE COURT: Oh, I neglected to inquire. What got  
21 damaged? I certainly hope it wasn't our impenetrable tables.

22 MR. FINKELSON: It was neither your tables nor your  
23 electronic equipment. It was my notes and my copy of the  
24 patent, which I've spilled many times outside the presence of

1     this room.

2             THE COURT: I think those tables, if you examine them  
3     carefully, are made of laminate.

4             MR. FINKELSON: They don't seem to be buckling yet.

5             THE COURT: No, no, they won't buckle. Well, this  
6     has been a fruitful afternoon. It's taken a little longer  
7     than I anticipated. Is there anything else we need to  
8     address?

9             MR. FINKELSON: No, your Honor.

10            MR. GOETTLE: No, your Honor.

11            THE COURT: Anyone?

12            Thank you, Mr. Finkelson. Mr. Hanglely had an  
13     afternoon off. He didn't say very much.

14            MR. HANGLEY: I did, I did.

15            THE COURT: Very good. Well, we're adjourned until  
16     Tuesday at 9:30. See you then. Have a good weekend.

17            MR. FINKELSON: You, too, your Honor.

18            MR. GOETTLE: Thank you very much.

19            (Court adjourned for the day at 4:28 o'clock p.m.)

20                                 - - -

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

s:/Geraldine C. Laws, CET  
Laws Transcription Service

Date 2/10/16